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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10

11 HO RIM KAM,

12 Petitioner,
13

14 v.

15 MARTIN LUTHER KING, JR.-MARCUS
GARVEY SQUARE COOPERATIVE BOARD
OF DIRECTORS,
16

17 Respondent.
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Case No.: C 07 4414 (SBA)

**PETITIONER'S REPLY TO
OPPOSITION TO MOTION TO
REMAND**

The Honorable Sandra B. Armstrong
Date: October 16, 2007
Time: 1:00 p.m.
Court: Courtroom 3, 3rd Floor

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1 **I. INTRODUCTION.**

2 Petitioner Ho Rim Kam filed his State Court Petition for a Peremptory Writ of
3 Mandamus (“Petition” or “Application”) alleging that Respondent Martin Luther King, Jr.-
4 Marcus Garvey Square Cooperative Board of Directors (“Board”) violated its Bylaws by
5 improperly removing and excluding Mr. Kam as a Director and the Treasurer of the Board.
6 The action therefore arises under the California Code of Civil Procedure, Section 1085(a).
7 Kam raised two issues in his Petition: (1) whether the Board’s determination that he had
8 become “delinquent” in his rent (“carrying charges”) for more than thirty days—a simple
9 fact issue, and not a “federal claim”—was unsupported and therefore flawed; and (2)
10 whether the vote to remove him was properly conducted under the Bylaws and California’s
11 Corporations Code (a state law issue if there ever was one).

12 Respondent is a California non-profit corporation governed by California law. It
13 may only remove directors and officers according to its Bylaws and the California
14 Corporations Code. As such, the only legal issue raised in this case is whether the Board
15 acted contrary to its adopted Bylaws and thereby violated California law in removing and
16 excluding Petitioner from his position as Director and Treasurer of the Board.

17 Respondent seeks to sweep under the rug that the only critical issue here is whether
18 the Board acted properly, not whether a HUD employee misunderstood the facts, or
19 incorrectly interpreted the King-Garvey Bylaws. Whether the Board violated the removal
20 procedures proscribed by its own Bylaws and thereby violated California law is in no way a
21 “federal question.” That issue is based entirely on state law and is largely a question of fact.

22 Respondent’s opposition offers a rambling and confused argument that a “federal
23 question” must be found here simply because Martin Luther King, Jr.-Marcus Garvey
24 Square Cooperative (“King-Garvey” or “Cooperative”) has a relationship with HUD. King-
25 Garvey does have a relationship with HUD because it rents to recipients of Section 8 federal
26 assistance and has a HUD insured mortgage. But Respondent cites no authority—and none
27 exists—to support the far-fetched notion that every single aspect of the Cooperative’s
28 existence therefore becomes a “federal question.” Such a finding would lead to an

1 extraordinarily slippery slope. Every issue affecting every tenant would then become an
 2 issue requiring federal adjudication. King-Garvey's relationship with HUD is not the issue
 3 in this proceeding.

4 Petitioner's mandamus action does not implicate a federal question. The action must
 5 be remanded to the proper forum, the San Francisco Superior Court.

6 **II. LEGAL ARGUMENT.**

7 **A. Petitioner's Action Must Be Remanded Because HUD's Actions Are Immaterial To This Dispute.**

8 **1. A HUD Employee's Letter To The Board Does Not Transmute the Board's Actions under State Law Into a Federal Question.**

9
 10 King-Garvey is a non-profit entity incorporated in California, and thus is responsible
 11 under State law for adhering to and enforcing its legally adopted Bylaws. Nothing in those
 12 Bylaws gives any other entity the power to interpret—or to enforce—those Bylaws.
 13 Respondent's argument that federal jurisdiction is proper because Petitioner's application
 14 purportedly involves a "directive" or a "determination" of a federal agency (Opposition
 15 Brief at 1) is a very large and very red herring.

16 To begin, the Court need look no further than the ostensible "directive" (Exh. D to
 17 the Declaration of Mr. Kam in Support of his Petition). That letter from the Acting Director
 18 of a Regional Operations Division of HUD to the Management Company employed by the
 19 Board, contains the following content: (1) an observation (not a "directive" and factually
 20 incorrect) that based on letters from King-Garvey, the Board—not HUD—had "indicated"
 21 that Mr. Kam was "past due" in his carrying charges; (2) a second observation by the author
 22 (not a "directive" and also factually incorrect) that a "balance due" by Mr. Kam had been
 23 "posted;" (3) a third observation or opinion that, based upon the By-Laws, Mr. Kam would
 24 not be "in good standing;" (6) a fourth observation asserting that the Bylaws would preclude
 25 Mr. Kam from serving on the Board; (7) and finally, the critical language that "the Board
 26 should be advised to take immediate action to bring the Cooperative into compliance with
 27 its by-laws" (in other words, to comply with state law – emphasis added).

28 There simply is no "federal determination" or "federal directive" here, and the rest of

Respondent's argument is essentially an effort to persuade the court to apply what amounts to a federal pre-emption approach that would bring to this Court every single dispute arising at the King-Garvey Cooperative. By way of example, suppose that the same HUD employee had been advised by the Management Company—erroneously—that a Coop resident's rent check had bounced; and had then made a similar observation to the Board that the Coop lease - which is on a HUD-approved form - would require that the person should be evicted. In Respondent's view this "directive" would transform any unlawful detainer case that followed into a federal question. This is not and cannot be the rule that controls federal jurisdiction.

2. HUD Does Not Have The Authority To Interpret And Enforce Respondent's By-Laws.

HUD does not "control operations" at King-Garvey as Respondent's grandiose argument asserts.¹ Respondent vastly overstates HUD's relationship with King-Garvey by suggesting that HUD can order the Board to act because the two parties entered into a "Regulatory Agreement". In fact, *Bloodsworth v. Oxford Village Townhouses, Inc.*, the case Respondent cites for the basis of federal jurisdiction, simply makes the broad generalization that "HUD normally enters into a Regulatory Agreement with the mortgagor which sets out conditions which the mortgagor must fulfill in order to maintain federal assistance throughout the life of the mortgage." 377 F.Supp. 709, 712 (N.D. Ga. 1974).

But Respondent cites no provision of any "Regulatory Agreement" that would confer

¹ It is here that the Brief reads like an argument for pre-emption: See Opposition Brief at page 3, line 18 asserting "HUD's pervasive control"; at page 9:26-27 asserting that "(HUD) controls operations at the Cooperative"; at 10:3 that the Respondent Board is "merely acting as a conduit for . . . (HUD)"; at 10:25 that Respondent's decision here is "dictated by federal law"; at 13:28 that "HUD's authority to manage and operate the Cooperative is an important issue of federal law"; at 14:7 that the Coop's "program . . . is so pervasively governed by federal law"; at 19:28 that "Federal laws . . . govern . . . the Coop's ByLaws"; and with maximum hyperbole at 15:17 that "all roads lead to HUD." Not a single citation to any regulation is offered.

This entire line of argument is indeed bizarre. If the Board were "merely acting as a conduit" for HUD, it would be incapable of acting independently or using any discretion. It would have no authority to serve its shareholders and this Court would be overseeing its every move.

1 on HUD the power to control a California non-profit Board's decisions about either the
2 election or removal of a Board member. The "Regulatory Agreement" in this case is not in
3 evidence here. It is not before the Court but is simply referred to, without detail, in other
4 documents. And even Respondent does not try to suggest that the Regulatory Agreement
5 could include some provision that ties receipt of mortgage funds to a federal right to
6 interpret or enforce King-Garvey's California Bylaws. It is particularly telling that
7 Respondent's several page litany of alleged connections between King-Garvey and HUD
8 (for example, that HUD regulations call for housing units to be assigned by family size,
9 Opposition at 4-6), nowhere provides that HUD holds some pervasive power to interpret or
10 enforce the Coop's Bylaws. That lengthy recitation of connections (that do not apply)
11 appears to be offered simply to obscure the fact that Respondent cites no specific federal
12 statute, regulation, or authority on which its claim of HUD's ostensibly preemptive power
13 could be based.

14 Because HUD's interpretation or opinion about King-Garvey's Bylaws, or about the
15 Board's obligation to exclude a member, is irrelevant, federal jurisdiction is improper and
16 this case should be remanded to state court.

17 **B. Petitioner's Action Must Be Remanded Because It Does Not Implicate a**
18 **Substantial Federal Interest.**

19 This case does not implicate a substantial federal interest because it is a simple issue
20 of contract interpretation under state law. The issue on which Respondent seeks to hinge
21 jurisdiction—whether HUD's interpretation of King-Garvey's Bylaws was erroneous and
22 unfounded—is simply irrelevant to the underlying claim. The Board was either justified
23 under state law in its removal of Mr. Kam, or it was not. Whether or not *HUD* was correct
24 in its interpretation of the Bylaws, however, is immaterial, as HUD had no authority to
25 regulate the Board's actions under state law. And indeed, HUD did not try to do so, but
26 merely stated its observations (based upon a flawed understanding of the facts).

27 While the case of *Grable & Sons Metal Prods., Inc. v. Darue Engineering & Mfg.*,
28 545 U.S. 308, 313-314 (2005), may state the general standard for applying federal

jurisdiction over cases raising a federal issue, the case itself is entirely distinct from the facts presented here. In *Grable*, Plaintiff's quiet title claim hinged on whether or not the IRS had violated a federal statute by improperly giving Grable notice that his seized property was to be sold. *Id.* at 310-311. Grable could not quiet title without proving that the IRS violated that specific federal statute. Here, the legal issue in dispute is whether or not Respondent acted properly under its Bylaws and the California Corporations Code. Petitioner's claim requires no determination of the propriety of HUD's actions because the Board was obligated to abide by state law.

C. Petitioner's Action Must Be Remanded Because It Does Not Present an Issue Arising Under the National Housing Act.

The case at bar is a mandamus action brought under the California Code of Civil Procedure, Section 1085(a), and presents an issue arising under the California Corporations Code. This case does not involve any issue arising under the "National Housing Act" Respondent cites not a single specific provision of that Act, which has hundreds of pages of regulations, that purports to govern how—under state law—a non-profit Board must elect or remove its members.

The cases Respondent cites to suggest that this case arises under the National Housing Act are inapplicable because both cases alleged a violation of federal law and neither are on point. *Keller v. Kate Maremount Foundation, et al.* and *Geneva Towers Tenants Org. v. Federal Mortgage Investors* are cases in which the court had to determine if there had been sufficient federal action to sustain a claim for a Fifth Amendment due process violation. 365 F. Supp. 798 (1972); 504 F.2d 483 (1974). Both are factually and legally distinct and neither stands for the proposition that any—and every—case that involves HUD thereby "arises under" the National Housing Act.

D. Petitioner's Action Must Be Remanded Because It Is Not Inextricably Linked to a Federal Agency Decision.

King-Garvey's relationship with HUD is immaterial to the determination of this case and thus cannot serve as the basis for federal jurisdiction.

Petitioner's Application for Peremptory Writ of Mandate alleges that the Board

1 violated California law by attempting to remove and exclude Mr. Kam. As a California
2 corporation, the Board had a legal obligation to follow its Bylaws and the California
3 Corporations Code. If the Board violated California law, and violated Mr. Kam's rights as a
4 Director, HUD would have no standing or power to "direct" the Board to act in violation of
5 state law. Respondent cites no authority to the contrary as none exists for such a
6 proposition.

7 **E. Petitioner Is Entitled to Attorney's Fees Because Removal Was Unreasonable.**

8 The court should award Petitioner attorney's fees because the removal of this case to
9 federal court was both unfounded and objectively unreasonable. In *Martin v. Franklin*
10 *Capital Corp.*, 546 U.S. 132, 135 (2005), the Supreme Court held that Defendant's removal
11 was "objectively reasonable" because it was based on law that was only later deemed
12 unsound. The foundation of Respondent's removal is not analogous to *Martin* as it was
13 based on irrelevant factual assertions and therefore unreasonable. Petitioner's Mandamus
14 Petition clearly alleges that Respondent violated California law by attempting to remove
15 and exclude Mr. Kam from the Board. Respondent removed the case to federal court on the
16 false argument that HUD's "relationship" with King-Garvey requires the resolution of
17 HUD's authority "to interpret the King-Garvey Bylaws," as if this would create a federal
18 question. However, despite filing a twenty-three page opposition, not once does the Board
19 offer any authority to establish that 1) HUD has the power to interpret and enforce
20 Respondent's Bylaws, or 2) that HUD has any authority over the election or attempted
21 ouster of a Board member. By removing this matter without support for its arguments,
22 Respondent's removal was objectively unreasonable.

23 As the Supreme Court wrote in *Martin*: "The appropriate test for awarding fees
24 under §1447(c) should recognize the desire to deter removals sought for the purpose of
25 prolonging litigation and imposing costs on the opposing party . . ." *Id.* at 140. Here,
26 Petitioner filed an Application under §1085 et. seq., which provides for a hearing in ten
27 court days. Respondent first sought and received a stipulated continuance of the hearing.
28 The Board then waited until two days before the already postponed hearing on the merits to

1 remove this case to federal court. This case has now been pending for fifty-six days, a far
2 cry from the ten days the California statute provides. Because Respondent has
3 unreasonably prolonged the litigation, thereby imposing substantial costs on Petitioner and
4 preventing Petitioner from speedy relief, attorney's fees should be awarded.

5 **III. CONCLUSION**

6 For all of the foregoing reasons, Petitioner respectfully requests that Petitioner's
7 Motion to Remand be granted. Additionally, Petitioner requests that he be granted the costs
8 and expenses incurred as a result of the removal.

9 DATED: October 2, 2007

Respectfully submitted,
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11 By 
12  _____

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